APPENDIX I.

Petition for Hearing on Denial of Writ of Mandate and Prohibition.

In the Supreme Court of the State of California.

Evelle J. Younger, Petitioner, v. Superior Court of the State of California for the County of Los Angeles, Respondent, Sirhan Bishara Sirhan, Real Party in Interest. 2d Civ. No. 33638.

TO ROGER TRAYNOR, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

1. On September 10, 1968, petitioner herein filed a petition for writ of mandate and prohibition in the Court of Appeal, a true copy of which, together with its appropriate appendices.[1] is attached hereto as Exhibit 1 and incorporated herein by reference as though set forth in full.

2. Thereafter, on September 25, 1968, said court denied, without opinion, the petition for writ of mandate

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[1]It should be noted that Appendix E as filed with the Court of Appeal is not identical to Appendix E attached hereto because, in the course of preparing this petition, it was noted that, due to an oversight, the order filed as Appendix E in the Court of Appeal does not truly reflect the final order made by the trial court. These differences, however, do not materially affect the merits of this case and are as follows: (1) Appendix E as filed in the Court of Appeal contains an introductory paragraph which the final order attached hereto as Appendix E no longer contains; (2) Appendix E as filed in the Court of Appeal contains the signature of Judge Arthur Alarcon and the date June 7, 1968, when, in fact, the order presently in effect and attached hereto as Appendix E is signed by Judge Richard Schauer and is dated August 2, 1968; and (3) Appendix E as attached hereto now contains the word "source" on page 2, line 30 whereas the Appendix E filed with the Court of Appeal did not have this word at that place.

and prohibition. A true copy of this denial is attached hereto as Exhibit 2 and incorporated herein by reference as though set forth in full, in accordance with rule 28(d) of the California Rules of Court.

3. Pursuant to rule 29(a) of the California Rules of Court, the petitioner contends the following as the reasons for requesting this court to grant a hearing:

This petition raises important questions regarding the restriction of pretrial publicity in a criminal case which have never been considered or resolved by this court and which are becoming more and more crucial to the proper administration of justice in criminal cases. While the courts of appeal have had occasion recently to consider a number of the various aspects of the problem (see, for example, *County of Los Angeles v. Superior Court*, 253 Cal.App.2d 670 [1967], and *Craemer v. Superior Court*, 265 A.C.A. 234, decided August 27, 1968), this court has made no recent expression of its views other than in the context of a change of venue. (See *Maine v. Superior Court*, 68 A.C. 386 [1968].) In light of the importance of this matter, we respectfully suggest that the time has now come for this court to provide guidance for both the bar and the judiciary in the State of California as to the judicial principles properly applicable to the issues of pretrial publicity. Just as this court believed it important to establish a proper frame of reference for the guidance of the bar and the judiciary in *Maine v. Superior Court, supra*, we suggest that this case presents a similar opportunity to formulate the criteria necessary to properly balance the right of public officials to exercise their freedom of speech, the right of the public to be informed of matters pertaining to pending crim-

inal cases, and the right of the defendant to obtain a fair trial. In this regard it should be noted that defendant's trial is presently set for November 1, 1968, and thus it becomes even more important that this court speedily resolve the problem in order that its ruling may be of benefit to the parties in this case.

WHEREFORE, petitioner prays that:

1. Petitioner be granted a hearing by this court upon his petition for writ of mandate and prohibition;

2. Petitioner be granted the relief prayed for in his petition as set forth in Exhibit "1"; and

3. Petitioner be granted such other and further relief as may be deemed appropriate and just.

Respectfully submitted,
EVELLE J. YOUNGER
District Attorney of
Los Angeles County
Attorney in Propria Persona

VERIFICATION

The allegations in the foregoing petition for hearing on denial of writ of mandate and prohibition are alleged as true by the undersigned public official, acting in the course and scope of his official capacity.

DATED. SEPTEMBER 26, 1968

Executed at Los Angeles, California.

EVELLE J. YOUNGER
District Attorney of
Los Angeles County

EXHIBIT 1.

Petition for Writ of Mandate and Prohibition.

Court of Appeal of the State of California, Second Appellate District.

Evelle J. Younger, Petitioner, v. Superior Court of the State of California for the County of Los Angeles, Respondent, Sirhan Bishara Sirhan, Real Party in Interest. 2d Civ. No.

COMES NOW EVELLE J. YOUNGER, District Attorney of the County of Los Angeles, on his own behalf and on behalf of the People of the State of California, and by this petition seeks a writ of mandate and prohibition, as authorized and provided for by Rule 56 of the California Rules of Court and Sections 1085, 1086, 1102 and 1103 of the Code of Civil Procedure, to require the respondent Superior Court to annul its "Order Re Publicity" issued on June 7, 1968, as modified on July 19, 1968, and August 2, 1968, which order prohibits, under threat of punishment for contempt, the District Attorney and other named parties from disseminating any information whatsoever (except for the limited matters set forth below) relating to the investigation and prosecution of a case now pending in the Superior Court entitled *People of the State of California v. Sirhan Bishara Sirhan,* No. A-233421. In support of this petition, petitioner alleges as follows:

I

On June 7, 1968, the Grand Jury in and for the County of Los Angeles returned an indictment, No. A-233421, in to respondent court charging Sirhan Bishara Sirhan with the crime of Murder in Count I thereof, and with the crimes of Assault With a Deadly

Weapon With Intent to Commit Murder in Counts II, III, IV, V and VI.

II

The respondent court accepted the indictment and declared same to be a true bill on June 7, 1968.

III

On June 7, 1968, the said Sirhan Bishara Sirhan was arraigned on the said indictment by the respondent court, and the matter was continued until June 28, 1968 for plea.

IV

On June 7, 1968, the respondent court issued an "Order Re Publicity," a copy of which is attached hereto as Appendix A, and it is requested that this order be received with the same force and effect as though incorporated into this petition *in haec verba.*

V

On June 28, 1968, the respondent court continued this matter for plea at the defendant's request to the date of July 19, 1968.

VI.

On July 19, 1968, the respondent court continued the matter again for plea at the request of the defendant to August 2, 1968.

VII

On July 19, 1968, the District Attorney of Los Angeles County, petitioner herein, filed in the respondent court written notice of motion to vacate or modify the order of June 7, 1968. A copy of this notice of motion is attached hereto as Appendix B, and it is requested that it be received with the same force and effect as though incorporated into this petition *in haec verba.*

Hearing on the motion was continued to the date of August 2, 1968.

VIII

On July 19, 1968, the court on its own motion modified the existing order of June 7, 1968 in several particulars. A copy of the order as modified is attached hereto as Appendix C, and it is requested that this order be received with the same force and effect as though incorporated into this petition *in haec verba.*

IX

On August 2, 1968, the District Attorney of Los Angeles County filed in the respondent court a document entitled "Argument and Points and Authorities in Support of Motion to Vacate or Modify Order of June 7, 1968 Re Publicity," together with a proposed new "Order Re Publicity." A copy of these two documents is attached hereto as Appendix D, and it is requested that they be received with the same force and effect as though incorporated into this petition *in haec verba.* Counsel for the defendant and *amici curiae* filed Points and Authorities in opposition to the said motion. Thereafter the respondent court heard oral arguments and denied the motion in its entirety. A reporter's transcript of this hearing is being lodged with this court pursuant to this petition, and it is requested that this transcript be received with the same force and effect as though incorporated into this petition *in haec verba.*

X

On August 2, 1968, the respondent court, on its own motion, effected an insubstantial modification of the instant order. The final "Order Re Publicity," as heretofore modified, is attached hereto as Appendix E,

and it is requested that this order be received with the same force and effect as though incorporated into this petition *in haec verba*.

XI

On August 2, 1968, the defendant entered a plea of not guilty to the charges set forth in the indictment and November 1, 1968 was the date set by respondent court for trial of this matter. On its own motion the court set the 4th day of October, 1968 for designation of the judge who will hear the case.

XII

The persons now subject to this order, pursuant to the language contained in Appendix E, are the following:

1. A party to this action;
2. Any attorney connected with this case as defense counsel or as prosecutor;
3. Any other attorney associated with this case;
4. Any judicial attache or employee;
5. Any public official, including but not limited to any chief of police, or any sheriff;
6. Any agent, deputy, or employee or any such persons;
7. Any grand juror;
8. Any witness having appeared before the Grand Jury in this matter;
9. Any person subpoenaed to testify at the trial of this matter.

XIII

These enumerated persons are prohibited from doing the following:

Release or authorize the release for public dissemination:

1. Any purported extrajudicial statement of the defendant relating to this case;

2. Any documents, exhibits, or any evidence, the admissibility of which may have to be determined by the court;

3. Any statement as to the existence or possible existence of any document, exhibit, or any other evidence, the admissibility of which may have to be determined by the court;

4. An opinion or any comment outside of court as to the weight, value or effect of any evidence as tending to establish guilt or innocence;

5. Any statement outside of court on the weight, value or effect of any testimony that has been given;

6. Any statement as to the identity of any prospective witness, or his probable testimony, or the effect thereof;

7. Any out-of-court statement as to the weight, value or effect of any purported evidence alleged to have been accumulated as a result of the investigation;

8. Any statement as to the content, nature, substance or effect of any testimony which may be given in any proceeding related to this matter.

XIV

The objective of the above-enumerated restrictions is succinctly expressed in the following quotation from the preamble to this order, as contained in Appendix E:

". . . it further appearing to the court that the dissemination by *any* means of public communication of any out-of-court statements *relating* to this case *may* interfere with constitutional right of the defendant to a fair trial and disrupt the proper administration of justice . . ." (Emphasis added.) (Appendix E.)

XV

The petitioner is, by virtue of the wording of the order, a person subject to the order and prohibited from doing those things set forth in paragraph XIII, *supra.*

XVI

The petitioner has information he believes the public is entitled to know, and which does not interfere with the constitutional right of the defendant to a fair trial or disrupt the proper administration of justice. Included among this information are facts pertinent to unfounded rumors relating to the claimed existence of witnesses or evidence purportedly affecting the prosecution of *People v. Sirhan Bishara Sirhan,* No. A-233421, but which, in fact, will not affect said prosecution.

XVII

By virtue of the "Order Re Publicity," the petitioner has been substantially hampered in making any disclosure whatsoever relating to the investigation and prosecution of *People v. Sirhan Bishara Sirhan,* No. A-233421.

XVIII

In issuing the "Order Re Publicity," as set forth in Appendix E, the respondent court acted illegally and in excess of its jurisdiction, since the order in its entirety violates the laws and constitutions of both the State of California and the United States.

XIX

As an alternative to paragraph XVIII, *supra*, it is alleged that in issuing the "Order Re Publicity," as set forth in Appendix E, the respondent court acted illegally and in excess of its jurisdiction in that portions of the order violate the laws and constitutions of both the State of California and the United States; and the portions which were in excess of the jurisdiction of the respondent court are not severable from the remainder of the order.

XX

As an alternative to paragraphs XVIII and XIX, *supra*, it is alleged that in issuing the "Order Re Publicity," as set forth in Appendix E, the respondent court acted illegally and in excess of its jurisdiction in that portions of the order violate the laws and constitutions of both the State of California and the United States; and that if these portions are severable from the remainder of the order, the petitioner is entitled to these severable portions.

XXI

Petitioner has a vital public interest in having the right and extent of public officials to make extrajudicial statements in criminal cases considered and determined by this court.

XXII

Petitioner has no plain, speedy or adequate remedy at law unless the order of the respondent court is annulled and vacated, either in whole or in part, and the respondent court is prohibited, either in whole or in part, from carrying out its threat to punish violations of the order by "swift action . . . for contempt." (See Appendix E, p. 2, line 5.)

CONCLUSION

WHEREFORE, petitioner prays that a peremptory writ of mandamus and prohibition issue out of this court, directed to the Superior Court, requiring it to annul, either in whole or in part, the order of June 7, 1968, as subsequently amended, and as now contained in Appendix E; and to refrain from carrying out, either in whole or in part, its threat to hold any person who violates siad order in contempt of court;

or, in the alternative, that the Superior Court appear before this court at a time and place to be fixed by this court to show cause why that court has not done so and why a peremprory writ should not issue; and that, in the meantime, the respondent court be commanded to vacate the present existing "Order Re Publicity" until further order of this court; and that petitioner have such other and further relief as is just and proper.

Respectfully submitted,

EVELLE J. YOUNGER
District Attorney of
Los Angeles County
Attorney in Propria Persona

VERIFICATION

The allegations in the foregoing petition for writ of mandate and prohibition are alleged as true under penalty of perjury by the undersigned public official, acting in the course and scope of his official capacity.

Dated this 10th day of September, 1968.

Executed at Los Angeles, California.

EVELLE J. YOUNGER
District Attorney of Los
Angeles County

Points and Authorities in Support of Petition for Writ of Mandate and Prohibition.

Court of Appeal of the State of California, Second Appellate District.

Evelle J. Younger, Petitioner, v. Superior Court of the State of California for the County of Los Angeles, Respondent, Sirhan Bishara Sirhan, Real Party in Interest. 2d Civ. No.

I

MANDATE AND PROHIBITION ARE PROPER AND APPROPRIATE REMEDIES IN THIS CASE

If, as is urged in subsequent portions of these Points and Authorities, the respondent court acted in excess of its jurisdiction and if the petitioner has no other plain, speedy and adequate remedy in the ordinary course of law (a matter which is discussed in part II of these Points and Authorities), mandate is a proper remedy for nullifying the "Order Re Publicity" of the respondent court to the extent that it has acted in excess of its jurisdiction, and prohibition is a proper remedy to prevent the respondent court from enforcing the order insofar as that court threatens to act in excess of its jurisdiction by the use of contempt. (See Rule 56 of the California Rules of Court and Code of Civil Procedure, Sections 1085, 1086, 1102 and 1103.)

Thus, in *County of Los Angeles v. Superior Court*, 253 Cal.App.2d 670, 675-676 (1967) it was held that prohibition would be a proper remedy to prohibit the issuance of a proposed preliminary injunction and the taking of any further proceedings in an action relating

to an attempt to preclude certain officials, including the District Attorney, from making extrajudicial statements to the public. Thus, this court clearly can prohibit the use of contempt upon which the respondent court intends to proceed in the event its "Order Re Publicity" is violated. (See Appendix E, p. 2, lines 4-6.) Furthermore, since in the present case, the actual order has been issued by the respondent court rather than stayed pending appellate proceedings, as was the case in *County of Los Angeles v. Superior Court, supra,* mandate must be issued to annul what has already taken place rather than prohibition being issued to prevent what was proposed to take place in *County of Los Angeles v. Superior Court, supra.*

II

THE PETITIONER HAS NO PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW.

The order from which relief is sought herein is similar to the injunction considered by the California Supreme Court in *In re Berry,* 68 A.C. 135 (1968). In that case, the persons affected by the injunction violated the injunction and thereby obtained appellate review. However, the Court noted that in violating the injunction the petitioners chose "the more perilous of the two courses open to them." (68 A.C. at 147.) Clearly, the petitioner herein could violate the order of the court and then seek appellate review from a judgment of contempt imposed by the respondent court for said violation. However, it would appear more appropriate, considering the office of the petitioner and the interests involved, for this matter to be tested by means of the present proceedings, similar to the manner in which the validity of an order suppressing publicity was tested in

County of Los Angeles v. Superior Court, supra. Yet unless this court holds a hearing in this matter, the only alternative available to petitioner, in order to test the validity from the order from which relief is sought, would be to violate the instant order. We respectfully request this court avoid any necessity for even considering such action by at least granting a hearing on this matter, in order that it may be processed in what may be considered the most orderly and lawful fashion, namely, "to comply with the order while seeking a judicial declaration as to its jurisdictional validity." (*In re Berry,* 68 A.C. at 146.)

III

PRELIMINARY STATEMENT

The order under examination presents more than the usual conflict between freedom of expression and fair trial. It totally ignores the dimension of legitimate public interest in governmental activity which is the raison d'etre of these constitutional rights.

Implicit in the constitutionally guaranteed freedoms of speech and press is the right of the public to be informed of all relevant facts of a major event. A defendant's fundamental right to a fair trial is not jeopardized by such disclosure.

Petitioner pursues the remedy hereby sought to advocate the paramount right of a fair disclosure of legitimate information to a properly interested and involved public. The existing "Order Re Publicity" emasculates this right.

The court may take judicial notice that the case of *People v. Sirhan* involves the violent death of a national political figure. The normal public interest en-

gendered by such an event is accentuated by the appalling fact that it is the third in a series of similar recent tragedies. It is obvious that this case will continue to receive the widest possible exposure through news media regardless of the existing "Order Re Publicity." It is to be expected that public surmise and conjecture will flourish in the absence of responsible information.

Petitioner respectfully contends that the circumstances attending the death of Senator Robert F. Kennedy present a classic example of legitimate public interest. An order precluding any significant official comment on these circumstances ignores that interest and is repugnant to the constitutional guarantees of free expression.

IV

THE PUBLIC HAS A RIGHT TO BE INFORMED AS TO THE PROCESS OF CRIMINAL CASES AND THE CONDUCT OF PUBLIC OFFICIALS

The importance and scope of the right of the public to be informed is clearly reflected in the following language of the California Supreme Court:

> ". . . the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals . . . are regarded as essential to the public welfare. . . .
>
> ". . . the public have the right to know and discuss all judicial proceedings, unless such right is expressly interdicted by constitutional or statutory provisions, or unless the publication prohibited by

the order of the court is of such a nature as to obstruct or embarrass the court in its administration of the law and the execution of the powers expressly conferred upon it." (*In re Shortridge*, 99 Cal. 526, 530-531 [1893].)

In *Wood v. Georgia*, 370 U.S. 375 (1962) the Court specifically stated that out-of-court publications regarding judicial proceedings are protected by the constitutional guarantee of freedom of speech and press, and these rights can only be impaired if there is an extremely high degree of imminence of an extremely serious evil and there is no doubt that the utterances in question constitute an imminent and not merely a likely threat to the administration of justice.

The Court observed that the fact that petitioner was a sheriff did not curtail his right of free speech and further observed that:

"The role that elected officials play in our society makes it all the more imperative that they are allowed freely to express themselves on matters of current public importance." (*Wood v. Georgia, supra*, at 395.)

". . . a broad conception of the First Amendment is necessary 'to supply the public need for information and education with respect to the significant issues of the times. . . .'" (*Wood v. Georgia, supra*, at 388.)

As stated in *Sheppard v. Maxwell*, 384 U.S. 333 (1965):

"A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The

press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." (384 U.S. 333 at 350.)

If it be conceded that there is a legitimate public interest in the conduct of criminal law enforcement, it is difficult to conceive of an occasion more likely to arouse such interest than the instant case.

We are not here concerned with a philandering medical practitioner or the possible existence of a one-armed bushy-haired stranger. We are concerned with the death of a national political figure and its possible national and international political implications.

V

THE "ORDER RE PUBLICITY" VIOLATES THE CONSTITUTIONAL GUARANTEE OF FREE SPEECH AND INDIRECTLY VIOLATES THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF THE PRESS

The persons subject to this order are enumerated as follows:

1. A party to this action;
2. Any attorney connected with this case as defense counsel or as prosecutor;
3. Any other attorney associated with this case;
4. Any judicial attache or employee;
5. Any public official, including but not limited to any chief of police, or any sheriff;
6. Any agent, deputy, or employee or any such persons;
7. Any grand juror;

8. Any witness having appeared before the Grand Jury in this matter;

9. Any person subpoenaed to testify at the trial of this matter.

These enumerated persons are prohibited from doing the following:

Release or authorize the release for public dissemination:

1. Any purported extrajudicial statement of the defendant relating to this case;

2. Any documents, exhibits, or any evidence, the admissibility of which may have to be determined by the court;

3. Any statement as to the existence or possible existence of any document, exhibit, or any other evidence, the admissibility of which may have to be determined by the court;

4. An opinion or any comment outside of court as to the weight, value or effect of any evidence as tending to establish guilt or innocence;

5. Any statement outside of court on the weight, value or effect of any testimony that has been given;

6. Any statement as to the identity of any prospective witness, or his probable testimony, or the effect thereof;

7. Any out-of-court statements as to the weight, value or effect of any purported evidence alleged to have been accumulated as a result of the investigation;

8. Any statement as to the content, nature, substance or effect of any testimony which may be given in any proceeding related to this matter.

The objective of the above-enumerated restrictions is succinctly expressed in the following quotation from the preamble to this order:

> ". . . it further appearing to the Court that the dissemination by *any* means of public communication of any out-of-court statements *relating* to this case *may* interfere with the Constitutional right of the defendant to a fair trial and disrupt the proper administration of justice . . ." (Emphasis added.) (Order Re Publicity, June 7, 1968, pp. 1-2.)

That such an order indirectly violates the constitutional guarantee of freedom of the press cannot be questioned. The framers of the Constitution recognized a special status of the press in the First Amendment only to secure to the people the special benefits of being informed. The press is but a conduit through which information flows to the public. It makes no difference at which end the conduit is blocked. If information is denied to the press, the public remains uninformed just as certainly as if the press had the information but was denied the right to publish it.

Fairly interpreted the provisions of the order under attack herein preclude comment by any informed official source respecting the existence or non-existence of any evidence which might conceivably arise in the investigation and trial of this case without regard to the remoteness of such eventuality. Implicit in this order is the assumption that any comment must deprive a defendant of due process of law. The conduit is effectively severed; the constitutional provisions of freedom of expression voided.

The vice of the "Order Re Publicity" is that it wholly ignores the judicial precedent of effectuating a balance between the constitutional guarantees of free speech and fair trial. In determining what restraint on freedom of speech and press are reasonable, the courts have firmly established the "clear and present danger" test.

This "clear and present danger" rule was first set forth by the United States Supreme Court in *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Under the holding of the *Bridges* case, in order to sustain a constructive contempt, the words must be used in such circumstances and must be of such a nature as to create a clear and present danger that they will bring about a substantive evil. This evil must be extremely serious and the degree of imminence extremely high before the utterance can be punished.

First Amendment rights may not be "sacrificed merely because some evil may result."[1] There must be "no doubt that the utterances in question are a serious and imminent threat to the administration of justice."[2] The danger "must not be remote or even probable; it must immediately imperil."[3]

It is irrelevant to marshal the generalizations of decided cases without discussing their application to the instant case. It is not enough to recognize that Senator

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[1]Dissenting Opinion per Douglas, *United States v. International Union United Auto. A. and A.I.W.,* 352 U.S. 567, 596; 1 L.Ed. 2d 563, 581 (1957).

[2]*Craig v. Harney,* 331 U.S. 367, 373; 91 L.Ed. 1546, 1551 (1947).

[3]*Craig v. Harney, supra,* at 1552.

Robert F. Kennedy was a prominent national figure and that his death under any circumstances would receive extensive publicity. The court is aware that Senator Kennedy was a candidate for presidential nomination and that his death occurred in a crowded public place virtually under the eyes of television cameras. Massive publicity was inevitable. This mere fact of inevitable publicity immediately attending upon the event of the Senator's death is the sole justification relied upon for the issuance of the "Order Re Publicity" three days later. Under the circumstances of this case mere publicity, of whatever magnitude, is not a substitute for the judicial standard of the "clear and present danger" test.

Satisfaction of the "clear and present danger" test invariably requires a plainfully precise consideration of the particular circumstances under which the speech is uttered. The court "cannot escape the exercise of judgment on the particular circumstances of the particular case"[4] and must turn "to the particular utterances . . . and the circumstances of their publication . . ."[5] The factual record before the court must be analyzed to determine whether it discloses by competent evidence "an actual interference with" the fair conduct of trials.[6] Because of this requirement that each case be decided on its own facts:

> "Broad prophylactic rules in the area of free expression are suspect. [Citations]

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[4]Frankfurter, concurring in *Pennekamp v. Florida*, 328 U.S. 331, 367; 90 L.Ed. 1295, 1314 (1946).

[5]*Bridges v. California, supra*, at 207-208.

[6]*Wood v. Georgia, supra*, at 393.

> Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (*N.A.A.C.P. v. Button,* 371 U.S. 415, 438; 9 L.Ed.2d 405, 421 [1963].)

The existing order is invalid in that it substitutes the vagueness of mere possibility for the reasonable probability of prejudice envisioned by the "clear and present danger" test. It is axiomatic that a court exceeds its jurisdiction when it attempts to enjoin conduct beyond its power to enforce obedience.

VI

THE "ORDER RE PUBLICITY" IS IN EXCESS OF THE JURISDICTION OF RESPONDENT COURT

In a proper case, *and for reasonable cause shown,* a court has jurisdiction to issue a restrictive order addressed to the parties litigant and attorneys before the court. The inclusion of law enforcement, governmental agencies, witnesses and potential witnesses having access to information relative to the proceedings exceeds the court's jurisdiction.

In commenting on the landmark decision of *Sheppard v. Maxwell, supra,* the Court of Appeal in *County of Los Angeles v. Superior Court,* 253 Cal.App.2d 670 (1967) held as follows:

> 'The opinion in Sheppard shows that the court does no more than urge control of prejudicial pretrial publicity by the adoption and enforcement of appropriate rules and regulations. Thus, the court suggested that the making of statements by any attorney appearing in a criminal case should be prohibited by appropriate rules of court governing the professional conduct of attorneys, as

was done in *State v. Van Duyne*, 43 N.J. 369, 389 [204 A.2d 841, 850, 11 A.L.R.3d 1086], by its interpretation of Canon 20 of the American Bar Association Canons of Professional Ethics. At the same time the court recognized that the courts have no direct control over the dissemination of potentially prejudicial information by law enforcement officers and said that such control should be exercised by the appropriate city and county officials." (253 Cal.App.2d 670 at 686-687.)

If there exists a substantial doubt as to the jurisdiction of a court to restrain the utterances of other agencies of government, there can be no rational justification for an order purporting to restrain the public utterances of individuals distantly connected wth the proceedings. Assuming, arguendo, the propriety of an order restraining publicity directed to law enforcement agencies, the court must recognize that persons not specifically mentioned in the order, or persons unaware of the provisions of the order, may from time to time divulge or suggest to various news media the existence or purported existence of certain witnesses or evidence purportedly affecting the investigation of the instant matter. The court should further recognize that investigation on the part of duly authorized law enforcement agencies may discredit the claimed existence of such witnesses or evidence. In such event, it is respectfully submitted that in the public interest the said law enforcement agencies should be permitted to reveal to the various news media the fact of such investigation and the evaluation thereof.

The court's attention is respectfully addressed to that portion of the order that prohibits "any out-of-

court statement as to the weight, value or effect of any purported evidence alleged to have been accumulated as a result of the investigation." (Order Re Publicity, June 7, 1968, p. 2.) Accepting the heretofore advanced premise of legitimate public interest as distinguished from morbid curiosity, national interest requires definitive answers to specific legitimate inquiry. If irresponsible sources suggest through the news media the existence of a national or international conspiracy, is the public interest or the defendant's right to a fair trial benefitted by the official declaration, "no comment" when investigation by responsible law enforcement has thoroughly discredited the purported claim? It is submitted that any different answer is precluded by the above-quoted language on penalty of contempt of court if this order be considered valid. It is unwise and unjustified to assume, as does the respondent court, that law enforcement officials entrusted with the investigation and process of this case will issue statements prejudicial to the defendant's right to a fair trial. Law enforcement shares the public concern for speedy and unequivocal justice.

The record in this case is devoid of any suggestion that law enforcement had released (or contemplated the release) for public dissemination of any information or comment inconsistent with this concern.

That respondent court has arbitrarily categorized any public utterance of an informative nature as prejudicial to the defendant is further demonstrated by the language prohibiting "*any* statement as to the content, nature, substance or effect of *any* testimony which *may* be given in *any* proceeding related to this matter." (Emphasis added.) (Order Re Publicity, June 7, 1968,

p. 3.) A simple example will suffice to illustrate the breadth of this prohibition:

Although the headliness of the world's press have announced the shooting of Senator Kennedy at the Ambassador Hotel and the contemporaneous arrest of the defendant, law enforcement is precluded from announcing that there is any evidenciary basis for these revelations. To recognize a "clear and present danger" to a defendant's right to a fair trial in such innocuous confirmation of the headlines is intellectual dishonesty.

It must be borne in mind that the order which petitioner seeks to vacate in this case will inevitably establish a precedent for the guidance of other courts in other cases. It is unlikely that the circumstances of these other events will be as saturated with instant publicity as the present case. The issue of principle involved is not dependent upon what the public may already know in this case, but upon what the public has a right to know in any case. Acquiescence in this order by petitioner is tantamount to an admission that in no case which may hereafter arise can the District Attorney of this County release to the press the fact that a citizen was shot in a hotel of this City. If such an announcement violates the 6th Amendment in this case, it violates the 6th Amendment in all cases. The constitutional guarantee of free speech is surrendered upon judicial sanction of this order.

A literal interpretation of the "Order Re Publicity" would have precluded the District Attorney of Los Angeles County from announcing on June 8, 1968 that Senator Kennedy died of gunshot wounds, as this would surely be a statement "as to the content, nature, substance or effect" of testimony to be elicited before

the Grand Jury. It is recognized that a violation of this nature might well be ignored by respondent court as being beyond the scope of its intention at the time the order was drafted. Perhaps any number of innocuous utterances relating to the case would be similarly considered. But under this order any person who would make a public disclosure significantly related to the process of this case does so at his peril. The all pervasive risk of contempt effectively stifles freedom of speech.

VII

THE "ORDER RE PUBLICITY" OF JUNE 7, 1968 IS VIOLATIVE OF SOUND PUBLIC POLICY

Independent of the constitutional issue, a grave question of policy must be resolved as to the ultimate wisdom of any order seeking to inhibit free expression in any area of constitutional protection. A non-critical acceptance of the concept that judicial imposition of prior restraints on freedom of expression is necessary in all criminal cases ignores strong precedent, persuasive authority and sound public policy.

Article I, Section 9, California Constitution, unequivocally provides that:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

The breadth and effect of this language was discussed by the Supreme Court of this State in *Dailey v.*

Superior Court of San Francisco, 112 Cal. 94 at 94 (1896).

> "The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak. . . . It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. . . ." (112 Cal. 94 at 97.)

The latest and best expression of public policy in this field is found and discussed in the recent case of *County of Los Angeles v. Superior Court, supra,* at 689-690:

> "As usual, says the Medina Committee 'there is, on the one hand, the question of power or jurisdiction and, on the other hand, the question of policy. Moreover, one cannot consider the two questions *in vacuo*. They must be discussed in relation to the groups of persons who would be affected by the control of prejudicial publicity. Thus, starting with the commission of the crime or the arrest of the accused or the filing of the indictment or information and continuing up to the time of the commencement of the trial or thereabouts, it is a serious question, both of power and of policy, whether the court in which the case is to be tried, or any court, should, by rule of court, by authority of legislative enactment, or by virtue of some competence supposed to be inherent in the

judicial function, have the right, vis-a-vis lawyers, members of the police force, or representatives of the press, to proscribe the publication or utterance of matter deemed prejudicial to the right of the accused to a fair trial. If such right exists, either actually or *in ovo,* then the judges, in this pretrial period, must have the power to fine and imprison as for contempt of court all lawyers, members of the police force, and representatives of the press who violate the orders or rules of proscription. The prospect, in this pretrial period, of judges of various criminal courts of high and low degree sitting as petty tyrants, handing down sentences of fine and imprisonment for contempt of court against lawyers, policemen, and reporters and editors, is not attractive. Such an innovation might well cut prejudicial publicity to a minimum. But at what a price!

"Initially a distinction must be drawn within the word 'pretrial' between the purely investigatory stage before any judicial proceeding has been instituted and the second stage which begins when the defendant is brought before a commissioner or magistrate or when a grand jury proceeding has commenced. The Committee is firmly of the opinion that the courts lack any power whatsoever over the police or the news media during the first stage of the pretrial period, except the ever-present power to control activities in and around the courthouse.

"During the second stage, the authority of the court increased to encompass those judicial or quasi-judicial proceedings. . . . Nevertheless, with

respect to the police and the press in the entire pretrial period we think it unwise and detrimental to the public interest to give such contempt powers to the courts and the judges. Moreover, we think that such proceedings and the court rules, legislation or what not else authorizing such contempt proceedings might well be held to be a violation of the First Amendment guarantees of free press and free speech. Furthermore, as to the police, we find no authority inherent in the courts or the judges to discipline them for alleged breach of their duties as police officers.' (Medina Report, pp. 39-40.)"

County of Los Angeles v. Superior Court, supra, suggests that which petitioner now contends: that the guardians of a defendant's right to a fair trial have over-reacted in applying the lessons of *Estes v. Texas,* 381 U.S. 532 (1965) and *Sheppard v. Maxwell, supra.* The order which petitioner here attacks is a prime example of over-reaction due to erroneous interpretation of the mandate of our highest Court. This argument finds support in the following excerpts from a speech delivered by Judge George Edwards, United States Court of Appeals, Sixth Circuit, to the Connecticut Council on Crime and Delinquency Forum on "Free Press and Law Enforcement," at Hartford, Connecticut on September 21, 1966:

"The most dangerous threat to the American ideal of free speech and press since the days of Joe McCarthy may well be the recommendations now pending before the American Bar Association Special Committee on Minimum Standards for Criminal Justice.

* * *

"Some part of my concern with this problem is that the current moves are defended as having been caused by judicial views about press abuse in the Sheppard case. Since I wrote (in dissent) in my court for a new trial for Dr. Sheppard, I feel some responsibility to point out that no judge who participated in review of that case advocated the strictures which are currently being contemplated.

"Justice Clark's opinion for the United States Supreme Court did *not* rule that Dr. Sheppard was denied due process because of pretrial publicity. His opinion did *not* suggest secret court hearings in criminal matters. His opinion did *not* call for sanctions against a free press. His opinion did *not* suggest silencing lawyers for months or years prior to a criminal trial."

The Supreme Court discussed numerous examples of misconduct giving rise, in the aggregate, to a violation of due process. The Court did not isolate pretrial publicity as an independently sufficient evil, but, on the contrary declared:

"While we cannot say that *Sheppard* was denied due process by the Judge's refusal to take precautions gainst the influence of pretrial publicity alone, the Court's later rulings must be considered against the setting in which the trial was held." (*Sheppard v. Maxwell, supra,* at 354.)

The Supreme Court specified certain safeguards which the *Sheppard* trial court might have imposed when confronted with the dangers apparent under the circumstances of that case:

"More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. [Citations]." (*Sheppard v. Maxwell, supra,* at 361.)

It is submitted that the Court did not say that the imposition of such restrictions was desirable in all other criminal cases or that judicial sanction of such restrictions would be forthcoming in the absence of the "clear and present danger" apparent in *Sheppard.* The *Sheppard* case does not authorize the imposition of blanket restrictions at the very outset of a criminal proceeding. A condition precedent to the employment of drastic remedies is demonstrable evidence of an impending violation of the defendant's rights. Publicity *per se* is not sufficient.

CONCLUSION

Petitioner submits that never before in the history of American judicial relations with the public has the voice of responsible law enforcement been more effectively muted than in this case.

The question posed by petitioner for consideration by this court is whether that voice shall be heard at all.

Respectfully submitted,
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Attorney in Propria Persona